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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B5

DATE: **AUG 26 2011**

Office: TEXAS SERVICE CENTER

FILE: 

IN RE:

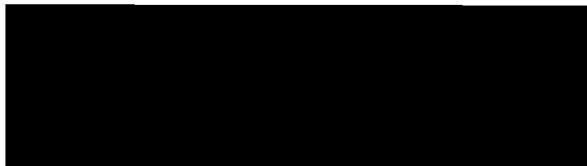
Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

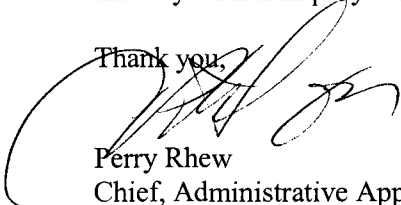
ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you.


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration.

The petitioner is a building and developing firm. It seeks to employ the beneficiary permanently in the United States as custom cabinet maker pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, which was certified by the Department of Labor.

The director determined that the Form ETA 750 failed to demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability and, therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree or an alien of exceptional ability. 8 C.F.R. § 204.5(k)(4). The director denied the petition accordingly.

On appeal, counsel asserts that the petitioner was asked if it wished to amend the petition and that the amendment of the I-140, Immigrant Petition for Alien Worker to designate block "e" for a professional or skilled worker, pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A), should have been accepted.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to aliens of exceptional ability and members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the job offered on the labor certification did not require a member of the professions holding an advanced degree or an alien of exceptional ability as indicated on the Form I-140, Immigrant Petition for Alien Worker.

On appeal, counsel asserts that the petitioner responded to a request for evidence from the director clarifying that the petition should be adjudicated under the third preference visa classification. Third preference visa classification includes professionals or skilled workers. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. *See also*, 8 C.F.R. § 204.5(l)(2). Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. *See also*, 8 C.F.R. § 204.5(l)(2).

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).¹

¹The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary. The submission of additional

Section 203(b) of the Act states in pertinent part that:

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --

(A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

- (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.**²

(Bold emphasis added.)

Here, the Form I-140 was filed on March 10, 2008. On Part 2.d. of the Form I-140, the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability. The accompanying labor certification establishes that the priority date is April 30, 2001. Item 14 of the labor certification indicates that the only requirement for the position of custom cabinet maker is two years of work experience in the job offered.

evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

²There is no indication in this case that the petitioner is requesting a visa based on the beneficiary as an alien of exceptional ability. Further, it is noted that ETA Form 9089 replaced the Form ETA 750 after new DOL regulations went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). In this case, the Form ETA 750 was submitted to DOL prior to PERM and retains a priority date of April 30, 2001.

The director issued a Request for Evidence (RFE) on July 15, 2008. He requested evidence supporting the petitioner's ability to pay the proffered wage of \$12.45 per hour and also requested confirmation from the petitioner if the petition should be adjudicated pursuant to the requirements for a third preference skilled worker. The director explained that the labor certification's requirements precluded approval of the beneficiary as an advanced degree professional because the minimum job requirement on the Form ETA 750 was two years of experience and did not require an advanced degree. With the request for evidence, the director provided a blank form to be completed and signed by the petitioner requesting that the petition be adjudicated as a third preference petition under section (b)(3)(A)(i). The record indicates that the form was completed and signed by the petitioner and submitted with its response to the director's request for evidence. The signed form states, "I request that my petition be adjudicated as a 3rd preference petition under Section 203(b)(3)(A)(i) skilled worker."

The regulation at 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability." The director denied the petition on September 15, 2008, concluding that the labor certification failed to establish that the position required an advanced degree professional and failed to support the Form I-140.

However in this case, in view of the director's previous invitation to the petitioner to amend the visa classification sought on the petitioner's Form I-140, and the petitioner's response indicating its preference, the AAO finds that in these circumstances, the petition should have been adjudicated as a skilled worker petition and not as an advanced degree professional. For this reason, the AAO withdraws the director's decision and remands the case to be considered as a petition for a third preference skilled worker. It is additionally noted that the current record does not sufficiently document the petitioner's continuing ability to pay the proffered wage pursuant to the requirements of 8 C.F.R. § 204.5(g)(2), or that the beneficiary meets the required experience on Form ETA 750.

Upon return to the director, the director should conduct further investigation on the merits of the petition and request any additional evidence from the petitioner based on the stated actual minimum requirements of the Form ETA 750. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision relevant to this issue.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable as noted above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.